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No. 79-1376

In the Supreme Court of the United States

OCTOBER TERM, 1979

STEPHEN PLISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court did not issue a written opinion. The order of the court of appeals (Pet. App. A1-A2) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1980. By order dated January 28, 1980, Mr. Justice Marshall extended the time for

filing a petition for a writ of certiorari to March 7, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's exclusion of certain evidence deprived petitioner of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of attempted income tax evasion for 1973, in violation of 26 U.S.C. 7201, and of subscribing to a false income tax return for that year, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to four months' imprisonment and a fine of $10,000 (Pet. 2). The court of appeals affirmed (Pet. App. A1-A2).

The evidence adduced at trial showed that from 1961 to 1974 petitioner was the sole stockholder and employee of Stephen Associates, Inc., an advertising firm that specialized in placing advertisements for commercial enterprises with radio stations throughout the country. For accounting purposes, Stephen Associates elected to be treated as a Subchapter S corporation from 1962 until September 30, 1974 (Pet. 3). As a result of the election, the corporation was required to file a federal income tax return, but paid no income tax on its profits. Rather, the corporation's profits were required to be reported on petitioner's individual income tax return as income,

whether or not such profits were distributed to him (Tr. 35-36).[1]

For many years, petitioner had retained Howard Acker, an accountant, to prepare both Stephen Associates' corporate income tax returns and his individual income tax returns. After the end of each of the corporation's taxable years (ending on September 30), petitioner would bring both the corporate and his individual financial records to Acker's office so that Acker's staff could prepare the corporation's books of account, its financial statements, its tax returns, and petitioner's individual tax returns (Tr. 37-39, 79-80). Before completing the accounting work, Acker would meet with petitioner to review the results and to obtain petitioner's approval for various accounting decisions (Tr. 39, 43, 53, 338-339).

In preparing Stephen Associates' tax returns for its taxable year ended September 30, 1972, Acker employed an accounting device designed to reduce the corporation's state and city taxes. Those taxes were computed according to alternative formulae based on either executive compensation or corporate profits. By describing a $5,000 amount as a professional fee paid by Stephen Associates to petitioner rather than as corporate profit, Acker was able to take advantage of the more favorable state and city tax formula for Stephen Associates. As a result of

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[1] "Tr." refers to the trial transcript. "GX" and "DX" refer to the exhibits admitted at trial. "A." refers to the record appendix filed in the court of appeals.

this treatment, petitioner's 1972 individual federal income tax return reported three different types of income received from Stephen Associates—salary, corporate profit reportable pursuant to Subchapter S, and professional fee income (GX 5; Tr. 50). For the taxable year ended September 30, 1973, Acker employed the same device to reduce Stephen Associates' state and city tax liabilities, this time allocating $15,000 as a corporate expense for a professional fee paid to petitioner. Acker specifically obtained petitioner's approval to reduce the corporation's profit by recording the $15,000 as a professional fee to petitioner (Tr. 41-42, 54, 123, 125-127, 134-135).

On April 1, 1974, Acker prepared and delivered to petitioner a completed personal income tax return for 1973. As in the case of the 1972 return, the 1973 return reported three items of income that petitioner received from Stephen Associates—petitioner's salary of $26,000, Subchapter S earnings of $9,671 and the $15,000 professional fee. The return showed a tax due and owing of $10,986 (GX 1). Petitioner, however, never filed that return. Instead, he hired Murray Malinofsky, an accountant, to prepare his 1973 personal income tax return (Tr. 182-183, 185-187, 212, 215). When he first met with petitioner in March 1974, Malinofsky noticed from records supplied by petitioner that Stephen Associates had been a Subchapter S corporation and asked petitioner for a copy of the corporation's Subchapter S return for the taxable year ending September 30, 1973, so that he could prepare petitioner's personal tax return for

1973 (Tr. 180-183). Petitioner responded that he did not have a corporate return for 1973 because an extension had been obtained for filing that return (Tr. 181). Petitioner also told Malinofsky that he did not know whether the corporation was a Subchapter S corporation or a regular corporation because he had asked his previous accountant to remove the corporation from Subchapter S status (Tr. 183-184). Malinofsky stated that he could not prepare petitioner's individual income tax return for 1973 until he knew the status of the corporation and that he would get an extension for filing the personal return (Tr. 183).

On April 12, 1974, Acker delivered to petitioner the corporation's tax return for the taxable year ended September 30, 1973 (Tr. 58-60). The return stated that the corporation had operated as a Subchapter S corporation for that taxable year (GX 4; A. 36-42). In June 1974, Malinofsky met with petitioner prior to filing petitioner's individual tax return for 1973 (Tr. 189-190). Malinofsky asked petitioner whether he had received the corporate return, and petitioner responded that he had not (Tr. 190, 197). At no time did petitioner tell Malinofsky that he had in fact already received a completed 1973 individual income tax return from Acker on April 12, 1974 (Tr. 238).[2] On the individual income tax return prepared by Malinofsky and eventually filed by peti-

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[2] In fact, petitioner subsequently told Malinofsky that he had not yet received the corporate return from Acker (Tr. 58-60, 190, 196).

tioner, the only income reported was petitioner's salary from the corporation. The professional fee and the corporate profits were omitted (Tr. 26; GX 2).

In December 1974, petitioner met with Malinofsky, who determined that Stephen Associates had, in fact, been a Subchapter S corporation during 1973. Based upon this determination, Malinofsky prepared an amended return reporting the $9,671 of corporate profits. However, the amended return still omitted the $15,000 professional fee received by petitioner from the corporation (GX 3). Although Malinofsky asked petitioner about the professional fee expense to the corporation, petitioner professed ignorance and gave no indication to Malinofsky that the fee represented income he was required to report (Tr. 222, 225-227). Petitioner maintained this position despite the fact that Acker had explained to him the proper tax treatment of the professional fee (Tr. 41-42, 48, 54, 123, 125-127; GX 5). The amended return was filed on January 6, 1975 (Tr. 26-27; GX 3).

In April 1975, a special agent of the Internal Revenue Service informed petitioner that he was under investigation and spoke to him about his 1973 individual return (Tr. 292-293). In June 1975, petitioner filed a second amended return for 1973. This return included the professional fee (Tr. 383-384).

At trial, petitioner testified in his own behalf. Despite petitioner's obvious success in the advertising industry and his experience in large-scale commodity and stock market transactions (Tr. 441-442), petitioner claimed that he was wholly ignorant of his corporation's tax and accounting matters, so

that he did not have the requisite criminal intent to evade tax or to file a false return (Tr. 520-536). In support of this claim, petitioner sought to establish that the $15,000 professional fee item was a complex paper transaction unrelated to income he actually received (Tr. 121-132, 512, 527).

During the trial, petitioner sought to introduce two worksheets prepared by Acker that related to cash disbursements of Stephen Associates for 1974 (A. 59, 75). The district court excluded the worksheets as irrelevant (Tr. 159-163). Petitioner also attempted to introduce certain opinion testimony from his two accountants. However, the district court sustained the government's objections to this line of testimony on the ground that it called for speculation and conjecture with respect to petitioner's knowledge and belief (Tr. 169, 175, 227-228).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that the district court erred in excluding certain proffered evidence and that this error warrants reversal. The documents excluded were cash disbursement sheets of his corporation for the taxable year ended September 30, 1974 (DX K; A. 75-78), and a so-called "Comparison and Analysis of Cash Withdrawal and Expenses * * *" for the fiscal year ended September 30, 1974 (DX I; A. 59; Tr. 148-149, 159-163). Petitioner claims that the documents would have established that the corporation did not actually disburse to him a $15,000 professional fee in 1973. He sug-

gests that, had the documents not been excluded, he could have effectively argued that because he did not physically receive the $15,000, he had not realized that he had to pay taxes on the professional fee. Petitioner argues that he could have thus demonstrated his lack of willfulness—an element of the crime of tax evasion. Petitioner asserts that the error in excluding this evidence was exacerbated by the government's argument that the money was actually distributed to him in 1973.

The district court did not err in excluding these documents. The excluded documents related to the corporation's taxable year 1974. Although the documents recorded certain financial transactions of the corporation that occurred in 1973, they recorded only those transactions from the last three months of that year, a period that fell within the corporation's 1974 taxable year. Since the $15,000 professional fee was incurred by the corporation during its taxable year ending September 30, 1973, this fee would not have appeared in the excluded documents whether or not it was actually distributed to petitioner. The documents in question were accordingly irrelevant to petitioner's defense, and the district court correctly excluded them from evidence. See *United States* v. *Elsbery*, 602 F.2d 1054, 1057-1058 (2d Cir. 1979).[3]

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[3] *United States* v. *Garber*, 607 F.2d 92 (5th Cir. 1979); *United States* v. *Sternstein*, 596 F.2d 528 (2d Cir. 1979); *United States* v. *Brown*, 411 F.2d 1134 (10th Cir. 1969); and *Haigler* v. *United States*, 172 F.2d 986 (10th Cir. 1949), cited by petitioner (Pet. 9-11), are distinguishable. In those cases the evidence excluded was at least arguably relevant.

Moreover, even if the excluded documents with respect to the corporation's taxable year 1974 had some marginal relevance, their exclusion did not undercut petitioner's claim that he did not receive the professional fee. The corporation's cash disbursement records for its taxable year 1973 (DX F, G, H, and J) were admitted into evidence on petitioner's motion (Tr. 149-150, 163-164). If, in fact, these more relevant records indicated that there had been no actual disbursement of a $15,000 fee to petitioner during the corporation's taxable year 1973, they provided all of the support necessary to enable petitioner to argue his claim.

Finally, contrary to petitioner's assertion (Pet. 7-8), the prosecution did not proceed on the theory that the $15,000 fee was actually distributed to petitioner and that he must therefore have known that he was required to report that fee as income on his tax return. Rather, the government argued at trial that petitioner's willfulness in omitting the $15,000 fee from his personal income tax return was proved by the facts that he had paid tax on an identically described professional fee item in 1972 (GX 5; Tr. 50); that he withheld from Malinofsky both the personal and corporate returns prepared by Acker (Tr. 56-60, 183-184, 238); that petitioner falsely told Malinofsky that he knew nothing about the professional fees (Tr. 185, 222, 225-227); that petitioner falsely told IRS agents that he had not received the personal income tax return prepared by Acker (Tr. 382-383); and that petitioner must have known that the expense

for the professional fees reported on Stephen Associates' return could only have been a reference to a fee attributable to him because he signed all of the checks issued by the corporation (Tr. 479-500).

Despite this overwhelming evidence of willfulness, petitioner nevertheless contends (Pet. 11) that the government argued to the jury that the $15,000 was actually distributed to him. But the prosecutor's argument only took issue with petitioner's defense that the $15,000 fee was merely a paper transaction of no benefit to petitioner. The prosecutor's statement that "he got it" was not an assertion that petitioner physically received $15,000 cash, but merely an assertion that petitioner had benefitted from the transaction involving the $15,000 fee (Tr. 557-558). Indeed, if there had been no professional fee deductible in the computation of the corporation's profits, those profits, chargeable to him as the sole shareholder of a Subchapter S corporation, would have been greater by $15,000.

2. Petitioner also contends (Pet. 14-19) that the district court erred in sustaining the government's objections to three questions he asked of Acker and four questions he asked of Malinofsky. In petitioner's view, these rulings unfairly deprived him of the opportunity to elicit proof that he did not understand that the professional fee was income to him. The pertinent facts are as follows: During Acker's cross-examination, petitioner's counsel asked him "* * * whether it would be obvious to someone looking at that 1120S that $50,000 [*sic*] in fees would

be taxable to Stephen Pliss?" (Tr. 169); "whether or not in [his] estimation * * * Pliss might not have realized that the $15,000 of the corporate income was reflected in the 1040?" (Tr. 170); and whether it was Acker's "testimony that Mr. Pliss realized that the $15,000 of corporate income is reflected in his 1040 as a fee?" (Tr. 175).

These questions asked Acker to speculate as to what petitioner was thinking—something Acker could not have known. Such speculation is inadmissible. See Fed. R. Evid. 602 and 701. Rule 701 permits the trial judge, in his discretion, to decide whether lay opinion testimony should be admitted. The rule was intended to eliminate the need for drawing the often "elusive" distinction between "fact" and "opinion." See Notes of Advisory Committee on Proposed Rules, Rule 701. The rule was designed to make clear that "The emphasis belongs on what the witness knows and not on how he is expressing himself." 3 *Weinstein's Evidence* ¶ 701 [02], at 701-9 to 701-717 (1978). Here, the questions put to Acker did not call for the type of lay conclusion envisioned by the rule. There was no way for Acker to know what the petitioner was thinking with respect to the $15,000 fee. See *United States* v. *Jackson*, 569 F.2d 1003, 1011, n.17 (7th Cir.), cert. denied, 437 U.S. 907 (1978). The trial court therefore correctly foreclosed this line of inquiry.

The district court also sustained the government's objections to two broad and vague questions put to Malinofsky with respect to petitioner's record-keep-

ing. Petitioner's counsel asked Malinofsky to describe the "quality" of petitioner's record keeping and whether Malinofsky thought petitioner's files were "orderly" (Tr. 227, 228). When counsel narrowed the focus of his question and asked Malinofsky whether the files were "categorized," Malinofsky was permitted to answer, without objection (Tr. 229). Thus, even if the district court erred in sustaining the government's objections, any such error was harmless.

The district court also sustained the government's objections to two further questions put to Malinofsky by which petitioner sought to establish his inability to distinguish between his tax return and the corporation's financial statement (Tr. 230, 231). Malinofsky had testified that during a meeting in petitioner's office, petitioner showed Malinofsky a financial statement when Malinofsky asked him for a copy of his corporate return (Tr. 229). To buttress the claim that petitioner was unsophisticated in financial matters, petitioner's counsel then asked Malinofsky the reasons for petitioner's mistake.[4]

But these questions put to Malinofsky called for his conjecture about petitioner's knowledge and belief

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[4] The two questions to which objections were sustained were the following:

> Do you know whether or not he [petitioner] gave you that [financial] statement in the belief that it was a corporate return? (Tr. 230.)
>
> Did he [the petitioner] know what the corporate return was? (Tr. 231.)

and for speculation with respect to his motive for acting as he did. See Rule 701, Fed. R. Evid. The district court therefore properly sustained the government's objections to these questions. At all events, Malinofsky was not precluded from testifying as to what petitioner said and did at the time of the incident. Moreover, petitioner testified and had ample opportunity to explain his understanding of his 1973 tax returns, the professional fee, and his confusion of his corporation's financial statement with his federal income tax return. Thus, any error the district court may have committed in sustaining the government's objections to counsel's questions was entirely harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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